IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

DAVID CLIFFORD MONEY,
PETITIONER

-versus-

STATE OF GEORGIA,
RESPONDENT

CASE # 76-45

PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF APPEALS

OF THE STATE OF GEORGIA

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Petitioner respectfully prays that a Writ of Certiorari issue to review the Final Order of the Supreme Court of Georgia denying a Writ of Certiorari and the Judgment of the Court of Appeals of the State of Georgia entered on April 15, 1976.

OPINION BELOW

The Order of the Supreme Court of Georgia denying the Writ of Certiorari to the Opinion and Judgment of the Court of Appeals of Georgia was not accompanied by an official

opinion, but the Court of Appeals of Georgia worte an official opinion, decided February 3, 1976, which is reported at 137 Ga. App. 779 (1976).

JURISDICTION

The Final Order of the Georgia Supreme Court denying a Writ of Certiorari was made and entered on April 15, 1976. Since substantial federal questions arising under the Constitution of the United States are involved in this case, the jurisdiction of this Court is invoked under the provisions of Article III, Sec. 2, of the Constitution of the United States, 28 United States Code §1257(3), and Rule 19(a) of the Rules of the United States Supreme Court.

QUESTIONS PRESENTED

(1) Was the Petitioner deprived of Due Process of Law under the Fifth and Fourteenth Amendments to the Constitution of the United States at the commitment hearing held on

April 21, 1975, when the State failed to disclose the true status and participation of "Cootie" Serritt and the State's agreement with "Cootie" Serritt and by the Trial Judge's failure to dismiss and quash the indictment or in the alternative remand the case for a preliminary hearing and in the Trial Judge's denial of Petitioner's Motion for a continuance based upon the Prosecution's disclosure of Serritt's true status and the State's agreement with him for the first time on the morning of trial.

(2) In a prosecution for the illegal sale of drugs, is the failure to chemically analyze certain drug samples and the intentional destruction of drug samples which are gathered and collected as evidence by an agent of the Georgia Bureau of Investigation materially favorable evidence, which should have been disclosed by the prosecution pursuant to the Motion for Exculpatory

Evidence under BRADY vs. MARYLAND?

(3) Was the Petitioner deprived of Due Process of Law under the Fifth and Fourteenth Amendments and the right of confrontation and cross-examination under the Sixth Amendment to the Constitution of the United States when the Trial Judge denied Petitioner's Motion to Recall GBI Agent Moore for the purpose of further cross-examination in the presence of the Jury to establish for impeachment purposes that the State of Georgia and the Prosecution had failed to analyze the drugs obtained by Serritt and had intentionally destroyed this evidence in the case?

CONSTITUTIONAL PROVISIONS INVOLVED

FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES; SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES; and FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

STATEMENT OF THE CASE

The facts necessary to place in their setting the questions now raised can be briefly stated as follows:

A. STATEMENT OF PLEADINGS IN THE CASE:

The Petitioner along with three other co-defendants was charged on Criminal Indictment #9853 in the Superior Court of Whitfield County, Georgia, with the violation of the Georgia Drug Abuse Control Act, in that he and the co-defendants, James Harold Lee, Hugh Lowe Jordan and Buford Blue Breland, did allegedly on March 8, 1975, unlawfully sell, deliver, distribute and possess with the intent to distribute a quantity of phentermine. To this bill of indictment the Petitioner and the three other named co-defendants charged entered their plea of Not Guilty. A jury was empanelled and after a three-day trial, the Jury returned a verdict of Guilt on July 23, 1975. The Trial Judge

thereafter sentenced the Petitioner to serve ten (10) years in the penitentiary, and the Petitioner filed a Notice of Appeal on August 1, 1975.

Prior to trial, Counsel for the Petitioner filed a Motion to Require the State to Produce Exculpatory Evidence in its possession under BRADY vs. MARYLAND, 373 U.S. 83 (1963). Prior to the trial of the case, Counsel for the Petitioner also filed a Motion to Require Disclosure of the name and identity of a decoy.

B. STATEMENT OF FACTS: One of the Prosecution's main witnesses against the Petitioner was James Marion Serritt, who was also known and referred to throughout the trial of this case as "Cootie" Serritt. Georgia Bureau of Investigation Agent Marion Moore, who was assigned to the Intelligence Unit of the Georgia Bureau of Investigation, testified that he had known of "Cootie" Serritt for approximately ten (10) years,

and during that period of time "Cootie" had been a "pimp" who had a "number of prostitutes who worked for him or have worked for him." (T. 159) Georgia Bureau of Investigation Agent Ken Copeland, Special Agent in charge of the Georgia Bureau of Invesitgation Narcotics Unit, testified that "Cootie" Serritt's reputation and character is bad, and "He is a known pimp. He has dealt in drugs before." (T. 232)

On February 23, 1975, "Cootie" Serritt had been arrested in Atlanta, Georgia, and charged with and later indicted for the possession of either seventy-seven (77) or eighty-seven (87) pounds of marijuana "coming out of Kansas." (T. 145, 161, 193, 194) Agent Moore testified at the trial of Petitioner that "Cootie" Serritt was worried about this charge against him and came to Agent Moore requesting his help and assistance regarding the marijuana charge in Atlanta, Georgia, and Agent Moore testified at the

trial that he told Serritt at that time that, "If and when he did me a good dope deal, what I call a big dope deal, then I would talk to him and tell him what I would do for him." (T. 148, 149) Thereafter, "Cootie" Serritt and Agent Moore met a few times, and Moore testified that at one of these meetings, "Cootie" Serritt gave him a bottle containing six or seven yellow football-shaped pills." (T. 145)

"Cootie" Serritt told Moore, "That these were the pills that he could buy" and that he had obtained them from co-defendant James Harold Lee. (T. 149) Moore testified, regarding this evidence, that he took these drug samples to a druggist in Dalton because the State Crime Lab was so far behind, and after he checked them out he told Serritt to go ahead with the deal. (T. 149)

After Marion Moore concluded his testimony in the trial, the Prosecution called its chief witness, "Cootie" Serritt, who

testified on cross-examination that the co-defendant Harold Lee had given him a bottle containing "approximately one hundred pills" instead of the "six or seven" testified to by Agent Moore and that he had given this bottle of pills to Agent Moore. (T. 202) Thereafter, in a hearing to perfect the Petitioner's Motion to Require the State to Produce Exculpatory Evidence held outside the Jury's presence, Agent Moore testified that the drugs which were delivered to him by "Cootie" Serritt, which Serritt alleged were given to him by co-defendant James Harold Lee, had never been analyzed by the State Crime Lab and were intentionally destroyed by him. (T. 282) Moore testified that he did not remember the date on which they were destroyed. (T. 283)

After Agent Moore decided to go ahead with Serritt's "big dope deal" he had Serritt to come to Dalton and to have the people bring the pills to Dalton on March 8, 1975, and

Agent Moore met him at the Georgia State Patrol Station and called the Drug Squad in Atlanta and made arrangements for them to assist in the operation. (T. 147) Two rooms were rented at the Ramada Inn in Dalton, Georgia, being Rooms 138 and 140. Georgia Bureau of Investigation Agents Carter and Metevier, with a transmitter concealed on her person, were to be in Room 138 and were to be the buyers of the drugs, and Agent Moore with other agents were to be in Room 140. (T. 149, 150)

At approximately 4:00 p.m. on March 8, 1975, "Cootie" Serritt met the Petitioner and three co-defendants named in the indictment at the Cracker Barrel Restaurant in Dalton, Georgia. Serritt testified that they were all sitting at the table, "And somebody said, 'We've got the pills.'" He testified further, "I'm not positive which one said that." (T. 185, 196, 197, 221) The five persons then left the Cracker Barrel Restaurant, co-

defendant Breland and co-defendant Harold Lee travelling from the restaurant in a Cadillac DeVille, and the Petitioner and co-defendant Jordan travelling in a Dodge Charger to the Ramada Inn, where they met "Cootie" Serritt. (T. 186, 226) Once they arrived at the Ramda Inn, Serritt parked his motor vehicle, got out of the vehicle and went into Room 138 with co-defendant Harold Lee, who was introduced to Agents Carter and Metevier. (T. 186, 187) After being introduced to the two agents, co-defendant Harold Lee stated that he had to step outside for a minute and left the room and returned in a few minutes and asked that "Cootie" Serritt step outside. (T. 245, 257, 258) After stepping outside Room 138 for a few minutes, "Cootie" Serritt returned and explained that the pills were in the Dodge Charger, which was parked outside Room 138, and Agents Metevier and

Carter were to go outside to inspect the merchandise and if they wanted to purchase it, to give the money to the man who would be standing beside the Dodge Charger. (T. 247, 258) Agents Metevier and Carter proceeded outside and the Petitioner was standing beside the Dodge Charger and raised the trunk, so that Agents Metevier and Carter could observe the pills. A designated signal was then given by Agents Metevier and Carter, and members of the Georgia Bureau of Investigation, Intelligence and Narcotics Squads and the Whitfield County Sheriff's Department arrested the Petitioner, who was standing beside the Dodge Charger, and the other three co-defendants, who were all seated in a Cadillac DeVille, forty or fifty feet from the Charger. (T. 248, 249)

As a ruse and gimmick, "Cootie" Serritt was arrested on a warrant charging him with violation of the Georgia Drug Abuse Control Act and was later even indicted by the Grand

Jury of Whitfield County on an indictment with the Petitioner, being Indictment #9722 in the Superior Court of Whitfield County, Georgia. (T. 170, 289)

The Petitioner along with the three other co-defendants Breland, Lee and Jordan, were afforded a joint preliminary hearing on April 21, 1975, before the Justice of the Peace Sidney Baxter. The Assistant District Attorney Steve Fain appeared in behalf of the State of Georgia at this joint preliminary hearing and sounded the cases. In addition, he sounded the case of STATE OF GEORGIA vs. JAMES MARION SERRITT, who was not present. Counsel for the Petitioner, noting the absence of "Cootie" Serritt, asked, "For the record, may I make an inquiry, did the State expect him to be present?" (Preliminary Hearing Transcript, p. 2; Trial Transcript, p. 10) Mr. Fain responded, "Certainly. He was given notice to be here and we expected

him to be present." (Preliminary Hearing Transcript, p. 2; Trial Transcript, p. 10) At the Preliminary Hearing, four agents of the Georgia Bureau of Investigation were called to testify on the issue of probable cause, either by the State or the Petitioner. All four of these agents of the State of Georgia repeatedly invoked the confidential informant rule when asked pertinent questions by Counsel with reference to how the investigation against the Petitioner had been conducted. (Preliminary Hearing Transcript, pp. 21--25, 45, 46, 67--71, 82) The questions of Counsel for the Petitioner and other Counsel were repeatedly met and frustrated with the invocation of the confidential informant rule when the witnesses were asked about the capacity, status and participation of the persons who gave information to law enforcement officers leading up to the commission of the offense which occurred on March 8, 1975. Counsel for the

Petitioner submits that in addition, Agent Marion Moore committed outright perjury at this Preliminary Hearing with the knowledge and acquiesence of the Assistant District Attorney Steve Fain. Agent Moore was asked regarding "Cootie" Serritt:

> "Q: Does he (Serritt) at the present time have a charge pending against him in Atlanta for violation of the Georgia Controlled Substance Act?
>
> "A: I think he has, yes sir.
>
> "Q: Has this charge been discussed with Mr. Serritt?
>
> "A: Are you saying by me?
>
> "Q: By anyone in your organization.
>
> "A: I don't know anything about in the organization. I know what I have done.
>
> "Q: <u>Have you discussed it with him?</u>

"A: Yes, sir, I have.

"Q: And have you made him some deal concerning this case?

"A: No, sir, I have not. I'm the one that arrested him on it, that's how I know about it." (Preliminary Hearing Transcript, p. 74; Trial Transcript, p. 15)(Emphasis Supplied)

At the conclusion of the Preliminary Hearing, Counsel for the Defendants in this case asked the State of Georgia whether or not the case against Marion James Serritt was sounded in "good faith." (Preliminary Hearing Transcript, p. 105; Trial Transcript, p. 11) The Assistant District Attorney stated that Counsel for the Petitioner should ask the District Attorney. Counsel for the co-defendants Harold Lee and Breland then stated:

"You are the alter-ego of the District Attorney, and I take your response as being virtually no response, and I think it is very obvious from what has been said that this whole thing insofar as Serritt is concerned is a ruse. That's my choice of words that I use for want of some better term, and if it is a ruse, indeed, I feel that I am entitled to know that in a good faith reply now as opposed to engaging in some semantical discourse and I feel like there is ample authority, but of course about all I can do is ask. Let the record show that he makes no reply and stands

mute." (Preliminary Hearing Transcript, p. 106; Trial Transcript, p. 12)

Prior to the trial, Counsel for the Petitioner filed a Motion to Require the State to Produce Exculpatory Evidence in its possession under BRADY vs. MARYLAND, 373 U.S. 83 (1963). In response to this Motion for Exculpatory Evidence, the only evidence made available to the Petitioner on the morning of the trial of the case was that, in fact, there was an agreement between the Prosecution and the State's Chief Witness, "Cootie" Serritt, that for his assistance the District Attorney would recommend probation on the Atlanta charge. (T. 2)

Counsel for the Petitioner was advised on July 21, 1975, the morning of the trial of this case, that the Prosecutions' Chief Witness, "Cootie" Serritt, was the "confidential informer" or "decoy." (T. 3)

Counsel for the Petitioner immediately made a Motion to Quash and Dismiss the Indictment and to remand the case against the Petitioner to the committing Court for another Preliminary Hearing on the ground that the District Attorney and his Assistant, together with agents of the Georgia Bureau of Investigation, had indulged in prosecutorial misconduct by refusing to disclose the true status and participation of the witness Serritt and the State's agreement with him prior to the morning of trial, which had deprived the Appellant of a meaningful preliminary hearing under the laws of the State of Georgia, and had further deprived the Appellant of Due Process of Law under the Fifth and Fourteenth Amendments to the Constitution of the United States. (T. 12--15) The Trial Judge overruled and denied the Motion to Quash and Dismiss the Indictment and to remand for another preliminary hearing, and Counsel for the co-defendants Lee and Breland

then made a Motion for a Continuance, which motion was joined by Counsel for Petitioner, and overruled by the Trial Judge. The Trial Judge overruled both the Motion to Quash and Dismiss the Indictment and to remand for a preliminary hearing and also the Petitioner's Motion for a Continuance in light of the recent disclosure of the status of "Cootie" Serritt, but he stated, "I don't particularly like the way that this was done either." (T. 17) The Trial Judge, however, based his ruling on the absence of a finding of any prejudice to the defense caused by the startling disclosure made to Counsel for the Petitioner the morning of the trial.

REASONS FOR GRANT OF WRIT OF CERTIORARI

WAS THE PETITIONER DEPRIVED OF DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AT THE COMMITMENT

HEARING HELD ON APRIL 21, 1975, WHEN THE STATE FAILED TO DISCLOSE THE TRUE STATUS AND PARTICIPATION OF "COOTIE" SERRITT AND THE STATE'S AGREEMENT WITH "COOTIE" SERRITT AND BY THE TRIAL JUDGE'S FAILURE TO DISMISS AND QUASH THE INDICTMENT OR IN THE ALTERNATIVE REMAND THE CASE FOR A PRELIMINARY HEARING AND IN THE TRIAL JUDGE'S DENIAL OF PETITIONER'S MOTION FOR A CONTINUANCE BASED UPON THE PROSECUTION'S DISCLOSURE OF SERRITT'S TRUE STATUS AND THE STATE'S AGREEMENT WITH HIM FOR THE FIRST TIME ON THE MORNING OF TRIAL.

The Court of Appeals of the State of Georgia has answered this question in the

negative and Petitioner asserts that the Court of Appeals has decided a federal question of substance not heretofore determined by this Court and has decided it in a way not in accord with the applicable decisions of this Court. This Court should grant the Writ of Certiorari to answer the compelling question of precisely when the person accused of a crime is entitled to the material specified in ROVIARO vs. UNITED STATES, 353 U.S. 53, and GIGLIO vs. UNITED STATES, 405 U.S. 150 (90 S.Ct. 763, 31 L.Ed.2d 104).

Counsel for Petitioner and the co-defendants at the Preliminary Hearing held on April 21, 1975, constantly sought to discover the true roll and status of James Marion "Cootie" Serritt, and whether tht State had some agreement with him for his assistance, so as to properly prepare and evaluate the Petitioner's case. Not only did Georgia Bureau of Investigation

Agent Marion Moore commit perjury to frustrate Petitioner's efforts in this regard, but the Assistant District Attorney also repeatedly frustrated Counsel's efforts to do so.

> "Q: When you arrested him (Serritt) was there any intention that he would be formally and officially prosecuted, or was that arrest effectuated purely as a smoke screen? I expect you to answer honestly and I believe you will.
>
> "A: I refuse to answer that.
>
> "Mr. Cook: I ask you to direct him to answer it and do your duty. I know you will.
>
> "Mr. Fain: Your Honor, if I may

"Mr. Cook: Let me say something here to you, Mr. Fain. I know you are aggravated with me and I am frankly a little aggravated too. The only thing, I am entitled to know, I am entitled to know if a co-defendant has been arrested in good faith or if he has been arrested as a result of a ruse and a gimmick and a smoke screen. I am entitled to know that and I think it rises to some Constitutional dimensions. I look you foursquare in the eye and I tell you, sir, that I will find it out here, in the Superior Court or in the Federal Court if you stay here long enough.

"Mr. Fain: This is certainly your right. I'm not trying to deny you any rights at all, Mr. Cook, you or the Defendants you represent.

"Mr. Cook: You can't deny me any because I'm not on trial, but I have a duty to do and I feel that my duty is being frustrated by a dishonest approach. And I think this thing is getting pretty serious.

"Mr. Fain: Well, I think this is a serious situation.

"Mr. Cook: I do too and I'm asking you as Counsel for the State to correct this abuse at this moment.

"Mr. Fain: Well, I see no abuse as far as this

witness is concerned."
(Preliminary Hearing Transcript, p. 69, 70)

This Court held in COLEMAN vs. ALABAMA, 399 U.S. 1 (90 S.Ct. 1999, 26 L.Ed.2d 387), that a preliminary hearing under the laws of the State of Alabama was a critical stage of a criminal prosecution at which the guiding hand of Counsel was required in order to properly confront and cross-examine witnesses for the prosecution, and to adequately discover the Prosecution's case to prepare for trial. In accordance with this Court's decision in COLEMAN vs. ALABAMA, supra, the Supreme Court of the State of Georgia in STATE OF GEORGIA vs. HOUSTON, 234 Ga. 721 (1975), decided that a preliminary hearing is also a critical stage in a criminal prosecution in the State of Georgia. The Petitioner contends that in the State of Georgia or in any State where the preliminary hearing is a critical stage of a

criminal prosecution, a person accused of a crime is entitled to fundamental Due Process of Law under the Fifth and Fourteenth Amendment to the Constitution of the United States with that full panoply of rights and privileges inherent in the very concept itself. In the case sub judice, the Petitioner argues to this Court that his rights to Due Process of Law at the Preliminary Hearing were violated in two particulars by serious prosecutorial misconduct which requires a reversal of his conviction and the grant of a new trial.

First, the State of Georgia refused to reveal to Counsel for Petitioner the true status and participation of Marion James "Cootie" Serritt as a "decoy," despite the persistent demands of Counsel for this information at the Preliminary Hearing approximately two months prior to the Trial of the case. The agents of the State of Georgia, with the full sanction and active

participation of the Assistant District Attorney, absolutely refused to disclose this information, to which Petitioner was entitled under decisions not only of this Court, but also of the Supreme Court and the Court of Appeals of the State of Georgia. ROVIARO vs. UNITED STATES, supra; WILSON vs. HOPPER, 234 Ga. 859 (1975); SMALLWOOD vs. STATE, 75 Ga. App. 716(1)(98 S.E.2d 602); RODDENBERRY vs. STATE, 90 Ga. App. 66 (82 S.E.2d 40); CROSBY vs. STATE, 90 Ga. App. 63 (82 S.E.2d 38). Second, the State of Georgia refused to inform the Petitioner of the agreement between the State of Georgia and "Cootie" Serritt, and the Georgia Bureau of Investigation Agent Marion Moore committed serious misconduct which rose to the status of outright perjury when he was questioned by Counsel for Petitioner with reference to any "deal" or agreement he had made with "Cootie" Serritt. He testified affirmatively under oath that he had "no" deal with "Cootie"

Serritt. Petitioner was entitled to this information under GIGLIO vs. UNITED STATES, supra, and ALLEN vs. STATE, 128 Ga. App. 361 (1973), and the Assistant District Attorney had an affirmative duty under that decision to correct the record, yet he did nothing.

The full extent of the Prosecution's trickery, chicanery and outright deception became abundantly clear when the State of Georgia disclosed on the morning of trial for the first time to Petitioner that "Cootie" Serritt was indeed a "decoy" and also disclosed that, contrary to the testimony of GBI Agent Moore at the Preliminary Hearing, Moore had an agreement with "Cootie" Serritt from the very outset of the whole transaction.

The Petitioner was entitled to this information upon request under the decisions of this Court in ROVIARO vs. UNITED STATES, supra, and GIGLIO vs. UNITED STATES, supra, but this Court has never answered the essential and important question as to the point

in time when Petitioner and other Defendants similarly situated are entitled to this information. Petitioner contends and argues to this Court that a person accused of crime must be informed as soon as possible in order to make a meaningful preparation for the trial of the case and is entitled to rely upon the sworn testimony of witnesses at a preliminary hearing, which was done in this case, clearly to deprive Petitioner of the truth at a preliminary hearing through artiface and subterfuge and then immediately prior to trial to disclose the truth, deprives him Due Process under the Fifth and Fourteenth Amendments. The State of Georgia in the case sub judice, however, subverted completely the truth-finding process of the preliminary hearing and converted a shield into a sword. The full extent of the State's deception becomes more evident when this Court considers that the Prosecution, as a part of this

gigantic ruse, even obtained a joint indictment by the Grand Jury of Whitfield County, Georgia, against Marion James "Cootie" Serritt on Criminal Indictment #9722. (T. 170, 289) The District Attorney even subverted the judicial process by presenting evidence to a Grand Jury that the State's undercover agent and "decoy" had committed a crime.

When the Prosecution made its startling disclosure on the morning of trial that "Cootie" Serritt was both a "decoy" and that GBI Agent Moore had an agreement with "Cootie" Serritt from the very outset of this transaction, Counsel for Petitioner, reeling from this disclosure, immediately moved to quash and dismiss the indictment and remand for a proper preliminary hearing consonant with Due Process of Law under the Fifth and Fourteenth Amendment to the Constitution, and when this was overruled, Counsel for Petitioner moved the Court for a continuance in order to

more adequately prepare for trial on the ground that the defense was now confronted with information which should have been divulged at the Preliminary Hearing. The Trial Judge overruled and denied this Motion. The effect was devastating, and a conviction was secured as a result of this serious deprivation of the Petitioner's right to Due Process of Law under the Fifth and Fourteenth Amendments to the Constitution of the United States.

It is impossible to avoid the conclusion that the Assistant District Attorney and agents of the State of Georgia acted improperly at the Preliminary Hearing which was afforded to the Petitioner, and in securing an indictment against Serritt, in that their actions misled, hindered, delayed and frustrated the preparation of the defense and discovery of truth and materially prejudiced the Petitioner's case.

IN A PROSECUTION FOR THE ILLEGAL SALE OF DRUGS, IS THE FAILURE TO CHEMICALLY ANALYZE CERTAIN DRUG SAMPLES AND THE INTENTIONAL DESTRUCTION OF DRUG SAMPLES WHICH ARE GATHERED AND COLLECTED AS EVIDENCE BY AN AGENT OF THE GEORGIA BUREAU OF INVESTIGATION MATERIALLY FAVORABLE EVIDENCE, WHICH SHOULD HAVE BEEN DISCLOSED BY THE PROSECUTION PURSUANT TO THE MOTION FOR EXCULPATORY EVIDENCE UNDER BRADY vs. MARYLAND?

The Court of Appeals of Georgia decided in the negative this federal question of substance, not heretofore determined by this Court, and has decided it in a way probably not in accord with the applicable decisions of this Court.

In the Constitutionally triumphant

decision of BRADY vs. MARYLAND, 373 U.S. 83 (83 S.Ct. 1194, 10 L.Ed.2d 215), the United States Supreme Court in its opinion stated:

> "We now hold that suppression by the Prosecution of evidence favorable to an accused upon request violated due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the Prosecution.
>
> "The principle of MOONEY vs. HOLOHAN is not punishment to society for misdeeds of a prosecution but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted, but when criminal trials are fair; our system

> of the administration of justice suffers when any accused is treated unfairly."
>
> 373 U.S. 83 at 87;
>
> 88 S.Ct. 1194 at 1196

Prior to arraignment, the Petitioner made, filed and urged a Motion for Exculpatory Evidence that sought the disclosure of any and all evidence that was of an exculpatory nature or was materially favorable to the Petitioner, either directly or in an impeaching manner, within the full context and purview of BRADY vs. MARYLAND, supra. Prior to the trial, the Prosecutor never informed the Defense or the Petitioner that any drugs or pills had been destroyed by the State or its agents or that they had failed to have any drugs chemically analyzed by the State Crime Laboratory.

In the trial, Georgia Bureau of Investigation Agent Moore testified that he contacted Serritt before the "bust" in this case and

encouraged him to set up a buy of ilicit drugs. (T. 148) Thereafter, Serritt brought Moore, according to Moore's testimony, a bottle of six or seven football-shaped pills and these were taken to a local druggist for him to look at and not to the Crime Laboratory for analysis. (T. 149) According to the testimony of Serritt on the same question, he testified that Lee brought him a vial of one hundred yellow pills and that it was these that were given by Serritt to Moore. (T. 200-202) Whether six or seven pills or one hundred, it is quite evident that this was the beginning point of the State's case against all four Defendants and it formed an integral part of the consideration of the case as a whole.

After Serritt and Moore had testified at the trial, there was no reason for Petitioner to suspect that these original pills had been destroyed, indeed, the State had never mentioned it in response to the

Petitioner's BRADY Motion or otherwise. It was only when the State Crime Laboratory expert, Terry Mills, had testified that the Petitioner had the first suspicion that something was amiss about these pills, inasmuch as according to Mills, he never analyzed them, although he had analyzed the ones seized in Dalton, these being the ones which were present in Court in two boxes. (T. 273, 275) Petitioner's Counsel then again called the Court's attention to and re-urged the BRADY Motion outside the presence of the Jury, and upon which there had been no compliance thus far in the trial of the case. (T. 275, 281) In the reurging of the Motion and in a colloquy between all Counsel and the Court, the following occurred:

> "Mr. Cook: May I continue one more step and inquire under the BRADY Motion where is the vial that contained the tablets? I mean

where is it today, not where will it be in the morning? Where is it indeed?

"Mr. Brantley: I don't know.

"The Court: Well, my ruling on that would be that you have had him on cross-examination and you have been able to ask him these questions.

"Mr. Cook: Your Honor, in order to perfect the record, may I put him on now and ask him?" (T. 279)

Counsel made a Motion to Recall Moore for cross-examination in the presence of the Jury to examine him on this subject, which was denied by the Court. (T. 279--281) Counsel did, however, finally obtain permission from the Court to at least pefect the

record on the BRADY question, and it was then positively confirmed by Moore for the first and only time that he had intentionally destroyed the vial of football-shaped pills obtained by him from Serritt. (T. 282--283) This fact had never been previously disclosed pursuant to the BRADY Motion, and Petitioner was thwarted from recalling Moore for further cross-examination on the same subject matter.

Although Mr. Brantley, the District Attorney, represented to the Court that he did not know where the vial of pills was, it is interesting to note that he was fighting every inch of the way to keep Agent Moore from being recalled for further cross-examination by Petitioner. Even if Mr. Moore had failed to tell Mr. Brantley, the District Attorney, it would be no solace here. In the case of UNITED STATES vs. ELEY, 335 F. Supp. 353 (N.D.Ga. 1972), Chief Judge Edenfield stated:

"It should also be pointed out that the BRADY duty affects not only the office of United States Attorney in Atlanta, but also any other investigative agencies of the government which have gathered information as part of the case of the prosecution against the accused who seeks disclosure."

In this same vein, the Fifth Circuit Court of Appeals held in UNITED STATES vs. DEUTSCH, 475 F.2d 55 (5th Cir. 1973), that the Department of Justice and the Post Office Department are not severable entities for purposes of production under BRADY.

The United States Supreme Court has said in MOORE vs. ILLINOIS, 408 U.S. 786 (92 S.Ct. 2562, 33 L.Ed.2d 706), that "The heart of the holding in BRADY is the prosecution's suppression of evidence, in the face of a

defense production request, where the evidence is favorable to the accused and is material either to guilt or punishment." Even if the evidence suppressed is favorable to the accused in an impeaching nature, it is disclosable under BRADY. See WILLIAMS vs. DUTTON, 400 F.2d 797 (5th Cir. 1968), Cert. denied, 393 U.S. 1105 (1969), Appeal after Remand, U.S., ex rel., WILLIAMS vs. DUTTON, 431 F.2d 70 (5th Cir. 1970).

The Petitioner argues that the failure to analyze the drug samples and the intentional destruction thereof by the Chief Prosecuting Agent of the Georgia Bureau of Investigation was materially favorable and was of an impeaching nature, and should have been disclosed to the Petitioner upon the production request. This evidence bore directly on the crediblity of GBI Agent Moore and "Cootie" Serritt. In NAPUE vs. ILLINOIS, 360 U.S. 264 (79 S.Ct. 1173, 3 L.Ed.2d 1217), this Court recognized the importance of the

credibility of a witness for the prosecution and stated as follows in that opinion:

> "The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely, that a defendant's

> life or liberty may depend."
> 360 U.S. 264 at 269;
> 79 S.Ct. 1173 at 1177.

It would be folly to suggest that evidence as to the failure to analyze drug samples in a drug case with facilities to do so available and the intentional destruction of these drug samples was not materially favorable to the Petitioner against the background that there was no earthly reason to destroy or to fail to analyze them. After all, the other drugs were preserved and analyzed! This was material evidence that could have very well affected the architecture of the State's entire case and its outcome insofar as the credibility of both Moore and Serritt were concerned. A jury may well have believed that they were destroyed because they did not contain any substance prohibited by law, or that they had never been obtained from the co-defendant Lee, or that they were not similar to those

drugs present in Court.

WAS THE PETITIONER DEPRIVED OF DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS AND THE RIGHT OF CONFRONTATION AND CROSS-EXAMINATION UNDER THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES WHEN THE TRIAL JUDGE DENIED PETITIONER'S MOTION TO RECALL GBI AGENT MOORE FOR THE PURPOSE OF FURTHER CROSS-EXAMINATION IN THE PRESENCE OF THE JURY TO ESTABLISH FOR IMPEACHMENT PURPOSES THAT THE STATE OF GEORGIA AND THE PROSECUTION HAD FAILED TO ANALYZE THE DRUGS OBTAINED BY SERRITT AND HAD INTENTIONALLY DESTROYED THIS EVIDENCE IN THE CASE?

The Court of Appeals of the State of Georgia has answered this question in the negative, and the Petitioner asserts that the Court of Appeals has decided a Federal question of substance not heretofore determined by this Court and has decided it in a way not in accord with the applicable decisions of this Court. Petitioner asserts that he was deprived of Due Process of Law under the Fifth and Fourteenth Amendments and of the Sixth Amendment right to confront witnesses against him and to cross-examine them when the Trial Judge manifestly abused his discretion in refusing to allow the Petitioner the right to recall GBI Agent Moore for further cross-examination after the Petitioner had learned for the first time after Moore had testified during the trial of the case that Moore had destroyed the drugs allegedly received by him from Serritt. (T. 281--286)

GBI Agent Moore testified that he

contacted Serritt before the "bust" in Whitfield County in this case and encouraged Serritt to "set up" a buy of illicit drugs. (T. 148) Thereafter, Serritt brought Moore, according to Moore's testimony, a bottle containing six or seven yellow football-shaped pills, and these were taken to a local druggist for him to look at and not to the State Crime Laboratory for analysis. (T. 149) According to the testimony of Serritt on the same question, Lee brought him a vial containing one hundred yellow pills, and that it was these that were given by Serritt to Moore. (T. 200--202)

At this point in time there was no reason for Petitioner's Counsel to suspect or to think that these pills had been destroyed by the State of Georgia or that the State of Georgia had failed to have these pills analyzed, since the State of Georgia had made no disclosure or mention of this fact pursuant to Petitioner's Motion for Discovery

filed at arraignment, although the State of Georgia should have disclosed these facts to the Petitioner. It was only after Mills had testified that the Petitioner perfected the record and discovered the concealment and suppression of this evidence by the State in violation of the BRADY Motion. (T. 275, 291) All of this testimony with reference to the concealment and suppression of evidence by the State occurred outside the presence of the jury. Counsel for the Petitioner then moved the Court to allow the recall of Agent Moore to the stand for further cross-examination in order to show the Jury that he in fact disposed of these drug samples. (T. 285) The Trial Judge denied this Motion. (T. 286)

In the State of Georgia, the general rule is that the recalling of a witness for further cross-examination is within the discretion of the presiding judge, which the Appellate Courts will never control

unless it is manifestly abused. DIXON vs. STATE, 116 Ga. 186 (5) Petitioner urges, however, that in this case the Trial Judge manifestly abused his discretion in denying the recall of GBI Agent Moore for further cross-examination in light of the following facts:

(1) The testimony of Moore outside of the presence of the jury demonstrated for the first time that Moore had destroyed the vial of yellow pills allegedly obtained by him from Serritt; Serritt having obtained them from Lee, this being the beginning point in this case;

(2) This was information that should have been previously supplied by the Prosecution under BRADY, Supra, inasmuch as this would have constituted evidence materially favorable and helpful to the accused, although it was intentionally suppressed by the State; and,

(3) The fact that these original drugs

had been destroyed and in view of the additional fact that they were never analyzed would have had a significant and favorable impact upon the jury since no rational or logical reason was ever given by Moore as to why they were destroyed.

Simply stated, Petitioner earnestly contends that the denial by the Court of the recall of Moore for further cross-examination deprived him of the right to confront his accusers and to cross-examine them, and that this constituted a manifest and palpable abuse of discretion by the Trial Judge.

The Sixth Amendment provides in part that:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . to have the assistance of

counsel for his defense."

The Supreme Court of the United States in POINTER vs. TEXAS, 380 U.S. 400 (85 S.Ct. 1065, 13 L.Ed.2d 923), held that the Sixth Amendment Right of an accused to confront the witnesses against him is a fundamental right and is obligatory on the States by the Fourteenth Amendment to the Constitution of the United States, and that the right of cross-examination is included in the right of confrontation.

The Trial Judge's exercise of his discretion in this case under the facts and circumstances as shown by the record show clearly that the Trial Judge abused his discretion in denying the Petitioner the right to recall GBI Agent Marion Moore for the purpose of cross-examination. The effect of this ruling was devastating to Petitioner's defense. Not only did his exercise of discretion deny Petitioner the

right to cross-examine GBI Agent Moore fully, but it also effectively denied him a trial by jury under the Fifth and Fourteenth Amendments, in that the fact of the destruction of this evidence and the failure by the State to have this evidence analyzed was never presented to the jury in order for them to assess properly the credibility of GBI Agent Moore and "Cootie" Serritt.

The Supreme Court of the United States in TURNER vs. STATE OF LOUISIANA, 379 U.S. 466 (85 S.Ct. 546, 13 L.Ed.2d 424), held:

"In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's

right of confrontation, of cross-examination, and of counsel." 379 U.S. 466 at 472--473, 85 S.Ct. 546, 550

The evidence of the destruction of the drug sample and the failure to analyze them was never presented to the jury and developed in their presence and this evidence could have changed the entire outcome of the case.

CONCLUSION

The Judgment and opinion of the Court of Appeals of Georgia and the Supreme Court of Georgia's denial of the Petition for Writ of Certiorari are a unique and unusual departure from the decisions of this Court and represent a breach in the wall of Due Process of Law under the Fifth and Fourteenth Amendments to the Constitution of the United States and represent a deprivation of the

Petitioner's Sixth Amendment right to confrontation and to cross-examine the witnesses against him, which constitutional rights protect every citizen from being convicted through such prosecutorial deception, trickery and misconduct, which subvert the truth-finding process of our judicial system. Against the prosecutorial and judicial abuses in this case, this high Court must steadfastly set its face. The Petition for Writ of Certiorari should, therefore, be granted.

RESPECTFULLY SUBMITTED,

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ATTORNEYS FOR PETITIONER

51589 MONEY v. THE STATE B-11

51590 BRELAND v. THE STATE B-12

51591 LEE v. THE STATE B-13

51719 JORDAN v. THE STATE B-26

BELL, Chief Judge.

Defendants were indicted and convicted at a joint trial for possession of a quantity of phentermine in violation of the Georgia Controlled Substance Act. Held:

1. Defendants were afforded a commitment hearing at which all were represented by counsel. At this hearing the State did not disclose another indictee, Serritt, was not to be prosecuted but would be a witness for the State. Defendants moved to quash the indictment and to remand for another commitment hearing arguing that the failure of the State to reveal the indicted Serritt's true role at the original commitment

hearing amounted to the denial of a commitment hearing. The Supreme Court in State v. Middlebrooks, 236 Ga. 52 , decided January 7, 1975, held that a preliminary hearing is not a required step in a felony prosecution and that once an indictment is obtained there is no judicial oversight or review of the decision to prosecute because of any failure to hold a commitment hearing; and that in no event will a conviction be reversed because a commitment hearing was denied an appellant. Thus, even if defendants' contention that they were in effect denied a commitment hearing is correct (which we do not decide) the mere denial of the commitment hearing would not entitle the defendants to reversals of their convictions under Middlebrooks.

2. Prior to trial defendants moved for discovery of evidence favorable to them.

The trial court held an in camera inspection of the prosecutor's file and declared that no evidence favorable to the defendants was in it. During trial evidence was shown that the witness, Serritt, a police informant, gave a GBI agent a sample of pills that the informant had obtained from defendant Lee. The GBI agent had these samples analyzed by a private druggist as the State Crime Laboratory was behind in its work. Based on the results of the private analysis the agent advised the informant to proceed with the transaction with defendants. The agent then destroyed this sampling of pills. Defendants claim they have been denied due process and a fair trial because of the failure by the State to disclose that this sample had been destroyed and not analyzed in the State Crime Laboratory. In support of this argument they rely on Brady vs. Maryland, 373 US 83 (83 SC 1194, 10 LE2d 215).

Brady held that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. The evidence that the informer had obtained these samples and had given them to the GBI agent; that the latter had them analyzed by a private druggist; that these pills had not been analyzed by the State Crime Laboratory was considered by the jury. The evidence of destruction of these pills, however, was not heard by the jury as this was only shown by the agent testifying at the hearing outside the jury's presence. Nonetheless, these facts do not come within the meaning of the Brady rule. There has been no suppression of evidence that was favorable to these defendants. These defendants were not on trial for possessing these sample pills.

The fact that the jury did not consider their destruction could not change the results of these cases. No constitutional error has been shown.

3. After the agent testified out of the presence of the jury that he had destroyed the sample pills, defendants requested that this witness be recalled for further cross-examination before the jury to establish that the sample had been destroyed; and "for the purpose of cross-examination in order to lay a ground for impeachment under Code §38-1803." The request was denied. The recalling of a witness for further examination at the instance of either party is always within the discretion of the trial judge. Dixon v. State, 116 Ga. 186 (5)(42 SE 357). This witness had previously been cross-examined extensively and at that time defendants had every opportunity to interrogate the witness as to the disposition of these pills. Code § 38-1803 does state

that to lay a foundation for proof of a contradictory statement a witness may be recalled at any time. Counsel did not inform the court what contradictory statement he expected to prove. Absent any offer of proof, we cannot say that the trial court abused its discretion.

4. In Case No. 51590, defendant Breland complains that the court erred in denying his motion for a mistrial, or in the alternative, for the court to strike prejudicial testimony and to instruct the jury to disregard it. During the cross-examination of the informant Serritt by counsel for defendant Money, it was disclosed that on a prior, unspecified date the witness had sold defendant Breland a large quantity of marijuana. Counsel for Breland promptly objected that this evidence of a separate and distinct criminal offense committed by his client improperly placed his character in issue.

The judge overruled the motions and admitted the evidence as going "into the intent and motive." It is the general rule that on the prosecution for a particular crime proof of a distinct, independent, and separate offense is never admissible, even though it be a crime of the same sort, unless there is some logical connection between the two from which it can be said that proof of one tends to prove the other, i.e., where the extraneous crime tends to prove malice, intent, motive, or the like and such an element enters into the crime charged. Bacon v. State, 209 Ga. 261 (71 SE2d 615). See Sloan v. State, 115 Ga. App. 852 (156 SE2d 177). Proof that defendant Breland at some unknown time purchased marijuana has no logical connection to the offense charged here. The trial court erred in permitting the jury to consider it. The State argues that Breland should not be heard to complain as this testimony was

elicited by counsel for the defense and cites Salisbury v. State, 222 Ga. 549(2) (150 SE2d 819). Had Breland's counsel elicited this, the State's argument would be tenable but that was not done as counsel of a co-defendant caused this evidence to be brought forth. We find that this error was harmful as to defendant Breland and we reverse to him only.

5. It was not error for the trial court to refuse to charge the jury on the principle that a defendant cannot be convicted on the uncorroborated testimony of an accomplice. The informant, Serritt, was not an accomplice but was acting voluntarily in cooperation with the police. Cauley v. State, 130 Ga. App. 278 (203 SE2d 239)

6. The evidence and inferences that can be drawn show that through the efforts of the police informant, Serritt, the

defendants attempted to sell and deliver a large quantity of phentermine pills to police officers who were acting undercover. The evidence authorized the conviction of each defendant.

Judgments affirmed in Cases Nos. 51589, 51591, 51719; reversed in Case No. 51590. Clark and Stolz, JJ., concur.

Court of Appeals
of the State of Georgia

Atlanta, February 25, 1976

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

51589. D. C. Money v. The State

51590. B. B. Breland v. The State

51591. J. H. Lee v. The State

51719. H. L. Jordan v. The State

Upon consideration of the motions for rehearing filed in these cases, it is ordered that they be hereby denied.

Court of Appeals of the State of Georgia
Clerk's Office, Atlanta FEB 25, 1976

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said ccurt hereto affixed the day and year last above written.

s/Morgan Thomas Clerk.

CERTIFICATE OF SERVICE

This is to certify that I have this date served a copy of the within and foregoing Petition for Writ of Certiorari to the Court of Appeals of the State of Georgia upon the following by placing a copy of same in an envelope properly addressed to him and depositing same in the United States Mail with sufficient postage thereon to reach its destination, to wit:

The Honorable Samual Brantley
District Attorney
Whitfield County Courthouse
Dalton, Georgia 30720

This 8th day of July, 1976.

William Ralph Hill, Jr.
ATTORNEY FOR PETITIONER